REFORMATION OF INSTRUMENT BECAUSE OF MISREPRESENTATION AS TO A MATTER OF LAW.—The law on the subject of the right to reform a written instrument is fairly well settled, but occasionally a decision appears which seems to lay down principles contrary to the generally accepted rules. Thus in a recent case in the Idaho Supreme Court, the plaintiff sought the reformation of a deed, given him by the defendant. It appeared that the defendant agreed to purchase certain mortgaged lands from the plaintiff, and to assume the mortgage. It was agreed by the parties that this assumption of the mortgage by the defendant should be omitted from the deed. The defendant, at the plaintiff's request, drew up a deed in which no mention of the mortgage was made, and the defendant duly executed it. The plaintiff prayed that a clause be inserted in the deed to the effect that the defendant take the premises subject to the mortgage. The court held that the deed should be thus reformed. *Wollen* v. *McKay,* 135 Pac. 832.

To entitle a party to the decree of a court of equity reforming a written instrument, he must show that the material stipulation, which he claims should be inserted or omitted in the instrument, was omitted or inserted contrary to the intent of both parties, and under a mutual mistake. *Nevius* v. *Dunlap,* 33 N. Y. 676. It must appear that the precise terms of the contract had been orally agreed upon between the parties and that the instrument afterwards signed fails to be an execution of the previous agreement, but expresses a different contract, and that this is the result of a mutual mistake. *German American Insurance Co.* v. *Davis,* 131 Mass. 316; *Story* v. *Conger,* 36 N. Y 673; *Jackson* v. *Andrews,* 59 N. Y. 244; *Purvines* v. *Harrison,* 151 Ill. 219, 37 N. E. 705; *Green* v. *Stone,* 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Chute* v. *Quincy,* 155 Mass. 189, 30 N. E. 550.

The only exception to this rule is that an instrument may be reformed when there is a mistake on the part of one party, and fraud on the part of the other. *Welles* v. *Yates,* 44 N. Y. 525, and cases cited; *Bales* v. *Hunt,* 77 Ind. 355; *Bush* v. *Merriman,* 87 Mich. 260, 49 N. W. 567; *Kyle* v. *Fehley,* 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866. "It must not be a mistake of judgment in that one party relied upon performance by the other of the provision omitted, instead of insisting on its being reduced to writing and put in the written instrument. If the instrument is executed in conformity with the agreement as to the terms that were to be incorporated in it, then there is no mistake, and if it is in conformity with the intention of one of the parties then there is no mutual mistake." *Doniphan, K. & S. R. Co.* v. *Mo. & N. A. R. Co.,* 104 Ark. 475, 149 S. W. 60.

The evidence to show that a mutual mistake has been made in a written instrument, or that a mistake has been made by one of the parties, and that such party has been induced to execute the instrument through the fraud of the other, must be clear and strong. It has been repeatedly held that such proof must be clear, unequivocal and convincing. *Sawyer* v. *Hovey,* 3 Allen 331, 81 Am. Dec. 659; *Andrews* v. *Ins. Co.* 3 Mason 6; *Turner* v. *Shaw,* 96 Mo. 22, 8 S. W. 897; *Sable* v. *Maloney,* 48 Wis. 331, 4 N. W. 479.

In the principal case, the court in allowing a reformation of the deed, says "there can be no question but that where a party agrees to sell and con-

vey to another party real property, and the purchaser agrees to assume and pay a mortgage upon said property executed before the contract of sale is entered into, and thereafter a deed is executed conveying the property, and the condition of payment of the mortgage existing before the time the contract and deed are made *was omitted from the deed by agreement of the parties,* for the reason that it might affect the credit of the party who agrees to pay the mortgage, *the omission of the contract to pay from the deed, was a fraud and * * * * may be reformed* by inserting the omission in the deed, upon alleging the facts."

This rule is, to say the least, entirely too broad. Under this rule a deed could be reformed even where the parties knew that such an agreement must be in writing, and yet the one party was willing to trust to the other's honesty in his oral promise to pay. This is practically what the court said in the *Doniphan* case, above. If both parties agree that a condition such as this shall be omitted from the deed, and it is actually omitted, the omission is, on its face, valid; the parties have the right to make such an instrument if they so desire, and in the absence of proof that the agreement to omit was procured by fraud, the instrument should be upheld as executed. A rule allowing a reformation where the agreement to omit is entered into bona fide and with full knowledge, is clearly too comprehensive.

In order to allow a reformation here, it should have been shown by clear and convincing proof that the agreement to omit was procured by fraud on the part of the defendant. The decision discloses no such fraud. The court says "the contract was made and the deed was drawn by the grantee, and at his request, for his own personal reason and benefit, which was no benefit to the grantor but a great injury, the grantee omitted the assumption and agreement to pay the mortgage." This is a decidedly different thing from saying that the agreement was procured by fraud.

The fraud alleged in the complaint was that the plaintiff was unskilled in the manner of transferring real property or making contracts, and that the defendant falsely and fraudulently informed the plaintiff that it was unnecessary to put the assumption of the mortgage in the deed, and that so long as the same was understood it need not appear in the deed.

These allegations were put in issue by the answer, and as far as appears from the opinion, the allegations were not found to be true. This renders unnecessary a discussion of the question as to whether or not there was a fiduciary relationship between the parties, granting that there would have been one established, had these allegations been true.

There being no fiduciary relationship established, we may admit the allegations of the complaint to be true for every other purpose, and still refuse to allow a reformation of the deed in this case. Even if there was a misrepresentation, it was as to a matter of law. No principle is better settled than that every person is presumed to know the law, both civil and criminal; and no one can, therefore, complain of the misrepresentations of another respecting it. *Reed* v. *Sidener,* 32 Ind. 373, and cases cited; *Fish* v. *Clelland,* 33 Ill. 238, and cases cited; *Upton* v. *Tribilcock,* 91 U. S. 45. The exception to this rule, that parties may reform where one has been mistaken as to his antece-

dent existing legal rights, has no bearing on the principal case. It seems to be settled that a representation with reference to the legal effect of a written instrument, cannot be fraudulent in a legal sense: *Smither* v. *Calvart,* 44 Ind. 242, and cases cited. Fraud cannot be predicated upon such statements or representations.

Hence it seems impossible to admit that there is any fraud in this case, and without fraud, the decision cannot be upheld.

As bearing on the general rule given in the principal case the most recent case in point is the case of *Weinhard* v. *Summerville,* 46 Wash. 127, 89 Pac. 490, 13 L. R. A. N. S. 1089, which the court in the principal case does not seem to have considered in its decision. In that case, the court says: "The mere fact that the appellant wanted all mention of the lease omitted from the deed could not constitute fraud in the absence of some word or act deceiving or intending to deceive the respondent in regard to the contents of the deed." Here there was not only no act of deception but the plaintiff knew of the omission in the deed.

The only case cited in the principal case in support of the rule which it lays down is *Kilmer* v. *Smith,* 77 N. Y. 226. This case seems to be distinguishable from the principal case on the very points in which the court in the principal case admitted the two to differ. In *Kilmer* v. *Smith* provisions were inserted in the deed without the knowledge of the plaintiff grantee, who accepted the instrument and had it recorded without knowing that it contained such provisions. In the principal case the provisions objected to were put in the deed with the knowledge and with the consent of the plaintiff grantor. S. E. G.

THE CONSTRUCTION OF THE REPAIR CLAUSE IN A STREET RAILWAY CHARTER. —Whether a clause, in a charter, ordinance or statute, which imposes an obligation upon a street railway to repair the street, carries with it the obligation to repave, is a question upon which the authoirties are in conflict. In a recent Maryland case, the city, after repaving the entire street, brought suit against the railway company for the cost of the pavement between the tracks, and for two feet on either side, the area which the company was bound to repair. The court held that "to repair" did not include repavement, and dismissed the action. *United Rys. & Elec. Co.* v. *Mayor, etc. of Baltimore,* (Md. 1913) 88 Atl. 617.

It may be well to note here that the principal case involves only the question of repavement under the clause "to repair." It is distinguishable from cases in which circumstances outside the contract reveal the intention of the parties, where the question is one of pavement, rather than repavement, and where the franchise is assessed as property for the improvement. While probably not supported by a majority of the states, this last proposition has been the means of compelling the company to pay for its share of the improvement in a number of jurisdictions. *Chicago Cy. Ry. Co.* v. *City of Chicago,* 90 Ill. 573; *Chicago* v. *Baer,* 41 Ill. 306; *City of Columbus* v. *Col. St. Ry. Co.* 45 Oh. St. 98, 32 Am. & Eng R. R. Cas. 292; *Cy. of New Haven*